CWI of Maryland, Inc. *and* Drivers, Chauffeurs, Warehousemen and Helpers Local Union #639, a/w International Brotherhood of Teamsters, AFL–CIO. Case 5–CA–26888

June 13, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on March 4, 1997, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on April 4, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 5–RC–14133 as the exclusive bargaining representative of the Respondent's truckdrivers at the Respondent's Beaver Heights, Maryland location. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On May 14, 1997, the General Counsel filed a Motion for Summary Judgment. On May 15, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 28, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer, the Respondent admits the jurisdictional allegations of the complaint, but denies all the remaining allegations, including the allegations that the truckdrivers at the Respondent's Beaver Heights, Maryland location constitute an appropriate unit, that the Union was certified and is the exclusive bargaining representative of that unit, that the Union requested the Respondent to bargain, and that the Respondent has refused to do so. In addition, in its response to the Notice to Show Cause, the Respondent asserts that it does not have a Beaver Heights location. Although the Board in its July 11, 1996 decision in the earlier, consolidated unfair labor practice and representation proceeding found that the Respondent moved the drivers' reporting site from Beaver Heights, Maryland to Central Garage, Virginia prior to the election for discriminatory reasons and ordered the Respondent to reestablish the Beaver Heights site as a remedy for its unfair labor practices, the Respondent argues that the Board at footnote 2 of its decision stated that the Respondent would be given the opportunity at the compliance stage to introduce relevant evidence concerning the burdensomeness of complying with the Board's reestablishment order.[1] The Respondent argues that if it can show that it would be unduly burdensome to reestablish the Beaver Heights site, the unit will be inappropriate. Accordingly, the Respondent argues that the General Counsel's motion for issuance of a summary judgment in the instant proceeding requiring the Respondent to bargain with the Union at that location should be denied.

It is well established that, in the absence of newly discovered and previously unavailable evidence or other special circumstances requiring reexamination of the decision in the representation proceeding, a respondent is not entitled to relitigate in a subsequent refusal-to-bargain proceeding representation issues that were or could have been litigated in the prior represen-

[1] In the underlying representation proceeding, both the Respondent and the Union filed objections to the election and the Respondent also challenged the ballots of 10 employees. In his original report on the objections and challenges, the Regional Director recommended, inter alia, that the Respondent's objection be overruled, and that two of the Union's objections and the challenged ballots be consolidated for hearing with the pending unfair labor practice charges filed by the Union which contained substantially the same allegations as the Union's objections. By unpublished order dated November 21, 1995, the Board adopted the Regional Director's findings and recommendations.

Thereafter, following the hearing in the consolidated unfair labor practice and representation proceeding, the administrative law judge issued a decision finding, inter alia, as alleged in the complaint and objections, that the Respondent had moved the drivers' reporting site from Beaver Heights, Maryland to Central Garage, Virginia prior to the election for discriminatory reasons and thereafter terminated most of the drivers in violation of Sec. 8(a)(3) of the Act. Based on these and the other unfair labor practices alleged in the complaint and found by the judge, the judge issued a recommended order requiring the Respondent, inter alia, to reestablish the Beaver Heights site, offer reinstatement to the drivers, and bargain with the Union based on the Union's preelection card majority under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). With respect to the 10 challenged ballots, the judge found that the 10 challenged voters were eligible voters, and, accordingly, recommended that the challenged ballots be remanded to the Regional Director so that they could be opened and counted and a revised tally of ballots issued. On July 11, 1996, the Board issued its decision affirming the judge's finding and conclusions and adopting the recommended order as modified. *CWI of Maryland, Inc.*, 321 NLRB 698 (1996), petition for enf. filed No. 97–1020 (4th Cir. Jan. 2, 1997). As indicated above, the Board at fn. 2 of its decision stated that the Respondent "would have the opportunity at the compliance stage to introduce relevant evidence concerning the burdensomeness of complying with" the reestablishment order.

Thereafter, the challenged ballots were opened and a revised tally of ballots issued which showed that the Union had won the election by a vote of 10 to 3. The Respondent subsequently filed objections with respect to the revised tally. On January 2, 1997, the Regional Director issued an amended supplemental report recommending that the objections be overruled and that a certification of representative be issued based on the revised tally. On February 11, 1997, the Board issued a Decision and Certification of Representative adopting the Regional Director's findings and recommendations and certifying that the Union is the exclusive bargaining representative of the truckdrivers at the Beaver Heights, Maryland location.

tation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Here, the Respondent has not offered to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine its decision regarding the Respondent's objections and the challenged ballots in the representation proceeding. Although the Respondent asserts in its response that further litigation regarding the appropriateness of the certified unit is required in light of the Board's findings in the prior, consolidated unfair labor practice and representation case that the drivers' reporting site was moved and its statement that the Respondent will have the opportunity at the compliance stage to contest the Board's reestablishment order, we reject that contention. Initially, we note that the Respondent failed to raise this issue prior to issuance of the certification in the representation proceeding, and thus is precluded from raising the issue here. Further, even assuming the issue has been properly raised in this proceeding, we find that the Respondent's contention is without merit. As indicated above, the Board in the earlier, consolidated unfair labor practice and representation proceeding stated that the Respondent would have the opportunity to contest the reestablishment remedy *at the compliance stage* of that proceeding. The instant proceeding is not the compliance stage of that proceeding, but a separate unfair labor practice proceeding based on the Respondent's refusal to bargain following the Union's subsequent certification in the representation proceeding. Issuance of a bargaining order in this proceeding is therefore no less appropriate than it was in the prior proceeding, where, as noted above, the Board issued a *Gissel* bargaining order as a remedy for the various unfair labor practices found in that proceeding.[2] Indeed, regardless of the outcome of the compliance proceeding, there are appropriate subjects for bargaining between Respondent and the Union. In this regard, we note that, in law, the discriminatees have remained unit employees since their discharge and continuing through the date of the election and certification to the present. Thus, even if Respondent does not have to restore the old terminal, it has had, and continues to have, a bargaining obligation with respect to these employees.

Finally, we also find that no issue warranting a hearing has been raised by the Respondent's various denials in its answer. Although the Respondent denies in its answer that the unit is appropriate and that the Union was certified, the Respondent stipulated to the appropriateness of the unit in the representation proceeding, and the Union's certification as the exclusive representative of that unit is clearly established by the record in the representation proceeding. Although the Respondent also denies in its answer that the Union requested bargaining and that the Respondent refused, the Union's February 13, 1997 letter requesting "immediate and continuous collective bargaining negotiations" following the Board's certification is attached as an exhibit to the General Counsel's motion and the Respondent has not disputed the authenticity of that letter in its response. Nor has it asserted anywhere in its answer or response that it has in fact agreed to bargain with the Union. Rather, as indicated above, it asserts that further litigation is required regarding whether it would be unduly burdensome to reestablish the Beaver Heights site before its bargaining obligation is established. In these circumstances, we find that the Respondent is refusing to bargain with the Union as alleged. See *Indeck Energy Services*, 318 NLRB 321 (1995).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Maryland corporation with facilities in Beaver Heights, Maryland, and King William County, Virginia, is engaged in the business of transporting refuse from Washington, D.C., to landfills in Virginia.[3]

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 for Browning Ferris, Inc., an enterprise engaged in interstate commerce and over whom the Board has asserted jurisdiction on a direct basis. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7)

[2] See generally *NLRB v. Colonial Knitting Corp.*, 464 F.2d 949, 952 fn. 10 (3d Cir. 1972); *NLRB v. Autotronics, Inc.*, 434 F.2d 651, 652 (8th Cir. 1970); and *NLRB v. Aircraft Engineering Corp.*, 419 F.2d 1303, 1304 (8th Cir. 1970) (granting enforcement of Board bargaining order notwithstanding employer's contention that it had ceased business or reorganized, since employer's ability to comply with order could be considered by Board in subsequent compliance or contempt proceedings). Issuance of a second bargaining order here is clearly warranted as the instant bargaining order is based on the Union's certification rather than under the authority of *Gissel*, and court review of the certification is only available under the Act upon issuance of such a bargaining order. See, e.g., *A.P.R.A. Fuel Oil*, 312 NLRB 471 (1993).

[3] Although the Respondent denies this allegation of the complaint, which describes the nature of the Respondent's business, the Respondent stipulated to a similar description in the underlying representation case and the administrative law judge made similar findings in the earlier, consolidated unfair labor practice and representation proceeding. Presumably, the Respondent denies this allegation based on its contention, discussed above, that the Beaver Heights location does not currently exist.

of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held February 3, 1995, the Union was certified on February 11, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All truckdrivers employed by the Employer at its Beaver Heights, Maryland location; but excluding all other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About February 13, 1997, the Union requested the Respondent to bargain, and, since about the same date, the Respondent has failed and refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after February 13, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, CWI of Maryland, Inc., Beaver Heights, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Drivers, Chauffeurs, Warehousemen and Helpers Local Union #639 a/w International Brotherhood of Teamsters, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All truckdrivers employed by the Employer at its Beaver Heights, Maryland location; but excluding all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Beaver Heights, Maryland, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

---

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Drivers, Chauffeurs, Warehousemen and Helpers Local Union #639, a/w International Brotherhood of Teamsters, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All truckdrivers employed by us at our Beaver Heights, Maryland location; but excluding all other employees, guards and supervisors as defined in the Act.

CWI OF MARYLAND, INC.